No. 83-5424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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v.

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MOTION FOR LEAVE TO FILE
A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate[1] (Department) respectfully moves this Court for leave to file

[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings .... as the Public Advocate
(Footnote continued on next page)

the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the attorney for the respondent has neither consented to nor opposed the Department's request.

The Department, an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2, has, for almost ten years, litigated extensively in major areas affecting "the public interest." During this period,

(Footnote 1 continued)
deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30. Within the Department, the Division of Mental Health Advocacy (Division) was established to represent "indigent mental hospital admittees" in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25.

the Department has participated in a wide variety of proceedings involving issues relating to housing, utility regulation, employment, the environment and the rights of the mentally handicapped.[2]

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2 The Division has litigated one case to this Court, see Rennie v. Klein 653 F. 2d 836 (3 Cir. 1981), vacated -- U.S. --, 102 S. Ct. 3506 (1982), on remand 720 F. 2d 266 (3 Cir. 1983), and has filed amicus briefs in three other cases involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1979), Jones v. United States, -- U.S. --, 103 S. Ct. 3043 (1983).

The Office of the Public Defender (Office), see N.J.S.A. 2A:158A-1 et seq., which is administratively housed in the Department and provides criminal defense services to all indigent persons in the State charged with indictable offenses, provided representation in this Court of respondent in Stickland v. Washington, -- U.S. --, 52 U.S.L.W. 4565 (1984).

The interest of the Department in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,[3] of institutionalized persons who wish to refuse the involuntary imposition of certain forms of powerful psychotropic medications,[4] and of persons facing involuntary civil commitment.[5] The

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3 See, e.g., State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978) (right of insanity acquittees to periodic review of commitments); State v. Khan, 175 N.J. Super. 72, 417 A. 2d 585 (App. Div. 1980) (right to contemporaneous competency determination prior to imposition of insanity defense over defendant's objections); In re A.L.U., 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984) (further articulation of periodic review rights of insanity acquittees).

4 See Rennie, supra. This Court has recently acknowledged that the liberty interests of involuntarily committed mental patients "are implicated by the involuntary administration of antipsychotic drugs." Mills v. Rogers, 457 U.S. 291, 299 n. 16 (1982).

5 See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule mandating appointment of counsel at
(Footnote continued on next page)

Court's decision in the instant case will directly affect this Department's clientele on a wide range of issues involving insanity defense determinations, the right to effective counsel, and the right to be free from the unwanted imposition of powerful medical treatment.

The Department seeks leave to file its brief in order to augment the views presented by the parties on the central issues in this case, namely: (1) the right of an indigent criminal defendant to independent medical expertise in furtherance of an asserted defense of insanity; and (2) the prejudicial effect to petitioner of the administration of psycho-

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(Footnote 5 continued)
all commitment hearings); In re Alfred, 137 N.J. Super. 20, 347 A. 2d 537 (App. Div. 1975) (scope of right of person facing commitment to appointment of independent psychiatric evaluation at county expense).

tropic medication through the course of his trial, to an extent which affected his demeanor and ability to communicate during his trial.

To the best of our knowledge, no other amicus or party in this case will deal with these matters from the same perspective as this Department has.

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

JOSPEH H. RODRIGUEZ
Public Advocate

By: Laura M. Le Winn
LAURA M. LE WINN*
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STATEMENT OF INTEREST

The interest of the New Jersey Department of the Public Advocate in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,[1] of institutionalized persons who wish to refuse the involuntary imposition of certain forms of powerful psychotropic medications,[2] and of persons facing

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2 See, Rennie v. Klein, 653 F. 2d 836 (3 Cir. 1981), vacated -- U.S. --, 102 S. Ct. 3506 (1982), on remand 720 F. 2d 266 (3 Cir. 1983). This Court has recently acknowledged that the liberty interests of involuntarily committed mental patients "are implicated by the involuntary administration of anti-psychotic drugs." Mills v. Rogers, 457 U.S. 291, 299 n. 16 (1982).

involuntary civil commitment.[3] The Court's decision in the instant case will directly affect this Department's clientele on a wide range of issues involving insanity defense determinations,[4] the right to effective counsel, and the right to be free from the unwanted imposition of powerful medical treatment.

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3 See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule appointment of counsel at all commitment hearings); In re Alfred, 137 N.J. Super. 20, 347 A. 2d 537 (App. Div. 1975) (scope of right of person facing commitment to appointment of independent psychiatric evaluation at county expense).

4 The Department's concern for -- and advocacy on behalf of -- various issues generated by the ongoing public debate on the very concept of the insanity defense, has been reflected on a national scale. See, e.g., National Commission on the Insanity Defense, Myths and Realities 15 (1982); Insanity Defense and Related Criminal Procedure Matters, H. Rep. No. 98-577, 98th Cong. 1st Sess., 5-6 n. 7-8, 10-11 (1983). See also Rodriguez, LeWinn, and Perlin, "The Insanity Defense Under Seige: Legislative Assaults and Legal Rejoinders," 14 Rutgers L. J.. 397 (1983); McBain, "The Insanity Defense: Conceptual Confusion and the Erosion of Fairness," 67 Marquette L. Rev. 1, 4 n. 15, 7-9 n. 29 (1983).

SUMMARY OF ARGUMENT

In criminal trials at which the question of defendant's mental capacity at the time of commission of the alleged offense is raised in defense, access by such defendant to independent psychiatric experts is essential both to aid in presentation of the defense and to rebut evidence which may be offered in opposition by the prosecution. The critical role played by such experts in these proceedings is well-established and has long-standing historical roots.

A defendant's right to access to independent experts in insanity trials inheres in his very ability to obtain effective assistance of counsel and a fair trial. An indigent defendant, therefore, is entitled to appointment of such an independent expert on his behalf, by authorization of the court.

The very nature of psychiatric expertise itself requires that parties to the proceedings be adequately equipped to subject such evidence to rigorous adversarial testing.

With respect to the issue of the administration of psychotropic medication during his trial, amicus contends that such a practice was inherently prejudicial to petitioner. The medication in question, Thorazine, affected his demeanor and capacity to communicate. As such it deprived him of his ability to participate in his trial and to control his appearance before the jury. In light of these severe consequences, petitioner should at least be afforded the protection of a pre-trial hearing at which the need for such medication would be the core inquiry.

ARGUMENT

I.

ACCESS TO THE ASSISTANCE OF INDEPENDENT PSYCHIATRIC EXPERTISE IS INDISPENSABLE TO A MEANINGFUL ASSERTION OF AN INSANITY DEFENSE

A. The Role Of Independent Medical Experts On Behalf Of Criminal Defendants Asserting An Insanity Defense At Trial Is Of Historical Origins

The questions of criminal intent and blameworthiness form the core inquiry into the susceptibility to punishment of an individual charged with the commission of a crime. Consideration of criminal intent is based on the assumption that a person has the capacity to choose between right and wrong, that he has a sense of wrongdoing. "The concept of 'belief in freedom of the human will and of consequent ability and duty of the normal individual to choose between good and evil' is a core concept that is 'universal and persistent in mature systems of law.'"

United States v. Brawner, 471 F. 2d 969, 985 (D.C. Cir. 1972), quoting Morissette v. United States, 342 U.S. 246, 250 (1952).

In this regard, the insanity defense has been a major component of Anglo-American jurisprudence for over 700 years.[5] Concomitantly, the role of expert

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[5] The insanity defense has been in existence since at least the twelfth century.

> But what shall we say of a madman bereft of reason? And of the deranged, the delirious and mentally retarded? Or if one labouring under a high fever drowns himself or kills himself? Quaere whether such a one commits felony de se. It is submitted that he does not, nor do such persons forfeit their inheritance or their chattels, since they are without sense and reason and can no more commit an injuria or a felony than a brute criminal since they are not far removed from brutes as is evident in the case of a minor, for if he should kill another while under age he would not suffer judgment. [That a madman is not liable is true, unless he acts under pretense of madness while enjoying

(Footnote continued on next page)

medical witnesses in insanity trials has long-standing historical roots.

(Footnote 5 continued)

> lucid intervals].

2H. Bracton, De Legibus Et Consuetudinibus Angliae 424 (c. 1250) (S. Thorne Trans. 1968).

Before Bracton, the sources of the insanity defense at common law can be traced at least to the Roman legal authorities that influenced Bracton. See generally, Plucknett, A Concise History of the Common Law 261-62 (5th ed. 1956). For example, in the Digests (or Pandects) of Justinian first published in A.D. 533, the following commentary on the insanity defense appears in an imperial "rescript" issued by the brother emperors Marcus Aurelius (A.D. 120-180) and Commodus (A.D. 161-192) during the period of their joint reign (A.D. 177-180);

> If it is positively ascertained by you that Aelius Perscus is to such a degree insane that, through his constant alienation of mind, he is void of all understanding, and no suspicion exists that he was pretending insanity when he killed his mother, you can disregard the manner of his punishment, since he has already been sufficiently punished by his insanity; still, he should be placed under careful restraint, and, if you think proper, even be placed in chains; as this has reference not so much to his punishment as to his own protection and the safety of his neighbors.

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Like the insanity defense, the practice whereby the courts call in experts to advise them on matters not

(Footnote 5 continued)

If, however, as often happens he has intervals of sounder mind, you must diligently inquire whether he did not commit the crime during one of these periods, so that no indulgence should be given to his affliction; and, if you find that this is the case, notify Us, that We may determine whether he should be punished in proportion to the enormity of his offense, if he committed it at a time when he seemed to know what he was doing.

2 The Civil Law 259 (S. Scott ed. 1973) For another translation, see Birley, Marcus Aurelius 272-73 (1966).

The maxim derived from this Roman commentary -- furiosus solo furore punitur (a madman is punished by his madness alone) -- appears in numerous English cases and treatises on the insanity defense. See, e.g. Broom, A Selection of Legal Maxims 5 (London 1845); Coke, The First Part of the Institutes of the Laws of England, or a Commentary Upon Littleton 247b (17th ed. 1817). See also, 1 Hale, The History of the Pleas of the Crown 29-37 (London 1736); Hawkins, A Treatise of the Pleas of the Crown, 1-3 (London 1739); Biggs, The Guilty Mind 47-56, 81-88 (1955); Weihofen, Mental Disorder as a Criminal Defense

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generally known to the average person goes back a long time: in Engligh courts, over four centuries. Initially, the experts were used as technical assistants to the court, rather than as witnesses. The judge summoned experts to inform him about technical matters; he then determined whether the information should be passed on to the jury. By the middle of the seventeenth century, when the finding of the facts had become the exclusive province of the jury, the practice of court-appointed experts reporting to the judge was abandoned; instead, the experts were called as witnesses by the parties involved in the dispute. Simon, "The Defense of Insanity" 11 J. Psychiatry & L. 183, 193 (1983).[6]

(Footnote 5 continued)

52-59 (1954); Simon, The Jury and The Defense of Insanity, 16-20 (1967); see generally Hermann and Sor, "Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees," [1983] Brig. Young L. Rev. 499, 506-515.

6 For an overview of the evolution of expert testimony in trials generally, see Guttmacher, The Mind of the Murderer 109-117 (1960) (hereinafter "Guttmacher"). ("By the last quarter of the seventeenth century the practice of employing partisan experts had become well established," id. at 112).

Since at least the beginning of the nineteenth century, "the search for biological explanations of deviant behavior has been unremitting. This is particularly true of that deviant behavior which is labelled as criminal." Halleck, "American Psychiatry and the Criminal: A Historical Review," in 1 Rieber and Vetter (eds.), The Psychological Foundations of Criminal Justice, 8 (1978) (hereinafter Psychological Foundations).

This development of medical involvement in issues of criminal responsibility is reflected in early nineteenth century cases such as Hadfield's Case, 27 Howell St. Tr. 1281 (K.B. 1800). The defendant, charged with high treason by virtue of his attempt to assassinate King George III, interposed a defense of insanity. Among the witnesses called on his behalf were: (1) Henry Cline, esq. [sic], described

by defense counsel, Lord Erskine, as "known to be one of the first anatomists in the world," id. at 1320; (2) Doctor Creighton, "a physician . . . [who had] applied particular attention to the disease of madness," id. at 1334; and (3) Mr. Lidderdale, described as "a surgeon," id. at 1335. Mr. Cline, the anatomist, testified to the possibility of brain damage sustained by the defendant from head wounds received in battle, as a result of which, "[i]t frequently happens . . . there is some derangement of the understanding." Id. at 1334. Dr. Creighton stated: "I have not the smallest doubt that he [defendant] is insane . . . . He is not a maniac, but he labours under mental derangement of a very common but particular kind." Id. at 133[illegible]. And the surgeon, Lidderdale, testified to having examined defendant

some four years earlier, "[i]n the spring of 1796, [when defendant was] brought in, in a state of insanity," and treating him with "bleeding, blistering, and cathartics." Id. at 1335-36. The jury returned a verdict of "Not Guilty: he being under the influence of Insanity at the time the act was committed." Id. at 1356.

Likewise, in Regina v. Oxford, 9 Car. & P. 525 (N.P. 1840) -- again involving a charge of high treason stemming from defendant's attempt to assassinate Queen Victoria -- "[s]everal eminent medical men were also called for the prisoner . . . . They all gave it as their decided opinion that he was of unsound mind."[7] Id. at 541. Here, too, the

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[7] A footnote to the opinion at the end of the above-quoted passage, states "no medical men were examined on the part of the prosecution, though it appeared that Mr. Maule, the solicitor to the Treasury (Footnote continued on next page)

jury found the prisoner "not guilty, he being insane at the time." Id. at 551.

In the landmark trial in M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843), the medical evidence -- adduced by witnesses "called on the part of the prisoner" 10 Cl. & F., supra, at 201 -- established that the defendant was "affected by morbid delusions" which carried him away beyond the power of his own control and left him no . . . [moral] perception [of right and wrong]." Id. No less than eight medical experts testified as to defendant's insanity; four specifically testified that his disease deprived him of control over his actions, and one, Dr. E.T. Monro, described the "type of thinking [which] is common in

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(Footnote 7 continued)

was present at an interview which those who were examined for [i.e., called by] the prisoner, had with him in Newgate." Id. at 541, n. (a)[1].

paranoid schizophrenia." Quen, "An Historical View of the M'Naghten Trial," in Psychological Foundations, supra, at 93-94. Defense counsel made "extensive and almost exclusive reference to the work of the American physician, Isaac Ray,[8] in his [counsel's] attempt to demonstrate that legally exculpable insanity should include more than disease of the intellect." Id. at 93.[9]

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8 Ray is referred to as "the leader of forensic psychiatry in [the United Sates]," in Guttmacher, supra at 121. Writing nearly 150 years ago, Ray stressed the "utmost importance" of medical testimony at an insanity defense trial, Ray, A Treatise on the Medical Jurisprudence of Insanity (1838), §27 at 48, (Overholser ed. 1962), noting it was essential that such testimony be "founded on extra-ordinary knowledge and skill relative to the particular disease, insanity," Id., §28 at 50. M'Naghten's lawyer focused on Ray's writings on insanity in his summation to the jury. See Diamond, "Isaac Ray and the Trial of Daniel M'Naghten," 112 Am. J. Psych. 651, 652-654 (1956).

9 This attempt was apparently rejected by

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The M'Naghten trial had a galvanizing effect on the medico-legal concept of insanity:

> Earlier, there was only a desultory interest in the medical jurisprudence of insanity among British physicians. The legal and Parliamentary reaction to the trial focused their attention and concern on this subject.
>
> * * * *
>
> In America, the M'Naghten Rules are still being debated. One result . . . [has been] the increased attention to the neuro-psychiatric aspects of criminality[.]" Id. at 96 [footnotes omitted].

While the rule of M'Naghten -- with respect to the proper legal definition of, or test for, insanity -- may have sparked debate, see, e.g., Davis v. United States, 160 U.S. 469, 479-80 (1895), United States v. Currens, 290 F. 2d 751

(Footnote 9 continued)

Chief Justice Tindal, who charged the jury essentially in terms of defendant's cognitive functioning. Quen, Psychological Foundations, supra at 94. See also, for further discussion of this point, Block, "The Semantics of Insanity," 36 Okla. L. Rev. 561, 562-65 (1983).

(3 Cir. 1961), the crucial role of medical experts in insanity trials has long been recognized. As at least one commentator has noted:

> Psychiatric testimony in insanity cases serves three purposes: first, it supplies the court with facts concerning the offender's illness; second, it presents informed opinion concerning the nature of that illness; and third, it furnishes a basis for deciding whether the illness made the patient legally insane at the time of the crime under that jurisdiction's standards of insanity. Halleck,"The Role of the Psychiatrist in the Criminal Justice System," in Psychiatry 1982 Annual Review 386, 391 (1982).[10]

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10 See, e.g., State v. Spencer, 21 N.J.L. 196, 208 (O. & T. 1846) (cited in Davis v. United States, 160 U.S. supra at 483), in which Chief Justice Hornblower acknowledged the debt owed to medical experts by "the administrators of criminal law" in insanity defense trials, to wit:

> I mean no disrespect to the learned writers on medical jurisprudence, or other distinguished men of the medical profession. On the contrary, I consider the administrators of criminal law greatly indebted to them for the results of their valuable experience, and professional discussions on the

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As will be discussed further in Point IB, infra, in cases where an insanity defense is interposed to criminal charges, a defendant's access to independent medical expertise is, by now, inextricably intertwined with his very ability to obtain a fundamentally fair trial.

(Footnote 10 continued)

> subject of insanity; and I believe those judges who carefully study the medical writers and pay the most respectful but discriminating attention to their scientific researches on the subject, will seldom, if ever, submit a case to a jury in such a way as to hazard the conviction of a deranged man.

See also, Washington, v. United States, 390 F. 2d 444 (D.C. Cir. 1967) for a thoughtful analysis by Chief Judge Bazelon of the need "in future cases to ensure that the issue of responsibility is decided upon sufficient information," id. at 451, and a discussion of how to render medical expert testimony more comprehensible to juries in criminal trials, id. at 454.

B. Failure To Afford A Criminal Defendant An Independent Expert In Furtherance Of A Proffered Insanity Defense Vitiates The Adversarial Process Which Is The Hallmark Of A Full And Fair Trial

This Court has long recognized that the right to counsel guaranteed by the Sixth Amendment to the Constitution is essential in order to protect a criminal defendant's fundamental right to a fair trial, Powell v. Alabama, 287 U.S. 45, 71 (1932); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963), and that this fundamental right is applicable to the several states through the Fourteenth Amendment, Gideon, 372 U.S., supra at 341. Specifically, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

Most recently, the standards by which the constitutionally adequate effectuation of this right should be measured were articulated by this Court in Strickland v. Washington, -- U.S. --, 52 U.S.L.W. 4565 (1984). There, in weighing a criminal defendant's claim of ineffective assistance of counsel in a capital case, the "benchmark" for judging such a claim was described by the Court as "whether . . . the trial cannot be relied upon as having produced a just result." Id. at 4570. The purpose of the Sixth Amendment guarantee was identified as "simply to ensure that criminal defendants receive a fair trial," and "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings," id. at 4571. In assessing the inter-relationship between the various components

which comprise a "fair trial," the Court stated:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. [citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275-76 (1942); and Powell v. Alabama, 287 U.S., supra at 68-69]. Id.

Referring specifically to the question of prejudice to a defendant from counsel's errors in the context of a capital case, the Court stated:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating

> and mitigating circumstances did not warrant death. Id. at 4572

The Court then concluded that:

> In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. Id. at 4573.[11]

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[11] It is acknowledged that the "breakdown in the adversarial process" which concerned this Court in Strickland, supra, was bottomed on a claim of errors or deficiencies in trial counsel's performance which prejudiced the defense, 52 U.S.L.W. supra at 4570-71, whereas, in the instant case, the "breakdown" and "prejudice" claimed by defendant stem from actions or decisions of the trial judge. Notwithstanding this distinction, the Strickland concepts of a fair trial and "the adversarial system embodied in the Sixth Amendment," id. at 4570, are directly pertinent to a consideration of the claims here.

In short, the inquiry on appeal should focus broadly on whether the trial below constituted a "reliable adversarial testing process." Id. at 4570.

Application of these principles to the instant case leads directly to the conclusion that the trial proceedings at issue fell far short of the "reliable adversarial testing process" envisioned by this Court. By refusing to appoint an independent psychiatric expert to examine defendant with respect to his mental state at the time of the offense, the trial court effectively precluded him from adducing evidence of his one ostensibly viable defense, at both the guilt [12] and penalty [13] phases of trial.

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[12] Cf. United States v. Tucker, 716 F. 2d 576, 580 (9 Cir. 1983) (defense counsel was ineffective in failing to pursue and prepare adequately defendant's "only plausible theory of defense [which was] readily apparent.")

[13] See, e.g., Estelle v. Smith, 451 U.S.
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Criminal convictions stemming from trial proceedings similar to those in the instant case, have consistently been overturned on appeal.[14] See, for example, Brinks v. Alabama, 465 F. 2d

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454, 472 (1981) ("A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty.")

[14] In cases where a similar result ensued from error or inaction on the part of the defense attorney, criminal convictions have been reversed, on the grounds of ineffective assistance of counsel. For example, in Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd 578 F. 2d 980 (4 Cir. 1978), further proceedings at 611 F. 2d 1383 (4 Cir. 1980), the trial lawyer's failure to obtain a mental examination of the defendant in aid of a viable insanity defense, was characterized by the court as "so below the standard of reasonable competence that it amounted to a deprivation of [defendant's] Sixth Amendment right to counsel." 578 F. 2d supra at 982. See also, Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982); and Rivera v. Franzen, 33 Crim. L. Rptr. 2276 (N.D. Ill. May 27, 1983), holding that a defendant who claims ineffective assistance of counsel due to his attorney's failure to investigate an insanity defense, does not have to show prejudice stemming from
(Footnote continued on next page)

446 (5 Cir. 1972), cert. den. 409 U.S. 1130 (1973), reh. den. 410 U.S. 960 (1973), a case closely analogous to the instant matter on the issue of a state judge's refusal to order a pre-trial sanity investigation pursuant to state law. The court found, based on the facts before it, that the trial court "exceeded the allowable range of its discretion" under Alabama law in denying a motion for a pre-trial sanity hearing brought by defendant's attorney based on evidence consisting of letters from lay witnesses and the attorney's personal opinion that his client "appeared to be insane." Id. at 447. The appellate court stated:

(Footnote 14 continued)

such failure in order to prevail on appeal. The court stated: "This Court would be awash in a sea of speculation were it to make a determination that a colorable insanity defense . . . could not have persuaded a jury that the petitioner was insane and therefore not legally responsible for his actions." Id. at 2277.

> [A]part from his claim that the state arbitrarily denied him a sanity investigation, Brinks advances a second argument which necessitates reversing his conviction. Under the due process and equal protection provisions of the Fourteenth Amendment and the Sixth Amendment's guarantee of effective legal counsel, Brinks contends that, because of his indigency, he was unable to secure expert testimony to present to the state court before it considered whether there was enough evidence to order a sanity investigation. Had he been affluent, or had the state provided him with funds, Brinks claims he could have introduced evidence which would have compelled a sanity investigation.
>
> * * * *
>
> Under these circumstances, we fail to see how Brinks could have received adequate representation from his appointed attorney. Moreover, the main thrust of the argument of petitioner's counsel in this court is that he could not adequately represent petitioner because of the lack of an available expert witness. Id. at 448 [footnote omitted].[15]

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15 Cf. Porter v. Estelle, 709 F. 2d 944 (5 Cir. 1983), cert. den. sub nom. Porter v. McKaskle, -- U.S. --, 52 U.S.L.W. 3825 (1984), where Justice Marshall, dissenting from the denial of certiorari in a capital case in which the trial court

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As noted above, Brinks is strikingly similar to the instant case with respect

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(Footnote 15 continued)

refused to order a psychiatric examination to determine defendant's competency to stand trial, stated:

> [A] substantial body of both medical evidence and evidence pertaining to petitioner's behavior cast doubt upon petitioner's ability to comprehend the proceedings against him. Surely the Court of Appeals erred in concluding that the cumulation of data was insufficient to entitle petitioner to a competency exam. 52 U.S.L.W., supra, at 3826.

The dissent would grant certiorari "[e]specially because the correct answer to that question [i.e., what is the standard for determining when a trial judge has a constitutional obligation to order a psychiatric examination to determine defendant's competency to stand trial] determines whether petitioner lives or dies[.]" Id. at 3825 (emphasis added). See, in this regard, State v. Noel, 102 N.J.L. 659, 680, 133 A. 274, 283 (E. & A. 1926)("The law has always been zealous in the protection of one who has lost his reason . . . . To execute one bereft of reason would afford no example to others. It would be cruel and inhuman."

(Footnote continued on next page)

to the pre-trial insanity investigation request on the part of the defendant. The constitutional infirmities found by the Brinks court as inherent in the factual setting before it, likewise should be found by this Court to inhere in the situation under review here. Cf. Ake v. Oklahoma, 663 P. 2d 1, 8 (Okla. Ct. Crim. App. 1983). See also, State v. Hamilton, 441 So. 2d 1192 (La. Sup. Ct. 1983), holding that defendant's "constitutional right to present a

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(Footnote 15 continued)

See also, Eddings v. Oklahoma, --U.S. --, 102 S. Ct. 869 (1982), reversing a death sentence because of limitations placed by the trial court upon mitigating evidence, at the sentencing phase, which was directed at demonstrating defendant's background and family history. The Court held this action violated the rule in Lockett v. Ohio, 438 U.S. 586 (1978), that, in capital cases, the sentencer not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record," 438 U.S., supra at 604 (emphasis in original), quoted in Eddings, 102 S. Ct., supra at 874.

defense [citing Washington v. Texas, 388 U.S. 14 (1967)]," id. at 1194, was violated by the trial judge's exclusion of "the unquestionably relevant testimony," id., of a psychiatrist offered by the defense, in a case where "[d]efendant's only viable defense was insanity," id.

Decisions by various federal courts concerning applications for appointment of independent experts under provisions of the Criminal Justice Act of 1964, 18 U.S.C. §3006A(e)[16] are instructive here; in construing the scope and intent of that statute, these courts have articulated principles and considerations which support petitioner's contentions

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16 18 U.S.C. §3006A(e) currently provides, in pertinent part:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate

(Footnote continued on next page)

here regarding access to independent psychiatric expertise in aid of his proffered insanity defense. See, for example, United States v. Schultz, 431 F. 2d 907 (8 Cir. 1970) (the purpose of the statute is "to provide the accused with a fair opportunity to prepare and present his case," id. at 911,[17] and noting further that "the adversary system

(Footnote 16 continued)

> inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services. P.L. 91-447, §1, Oct. 14, 1970.

17 In the course of its analysis of this issue, the court alluded to a portion of the legislative history of the statute as follows:

> President John F. Kennedy, in transmitting proposals for this type of legislation to Congress wrote House Speaker John McCormack of the great need for such enactment:

(Footnote continued on next page)

cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in the presentation of this issue [mental competency] to the jury." Id.) [18]

(Footnote 17 continued)

> In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow. 2 U.S. Cong. & Admin. News p. 2993 (1964). Id. at 909, n. 2

[18] A further observation made by the Schultz court is particularly pertinent to the facts of the instant case, to wit:

> Schultz, in fact, never had the benefit of any psychiatric examination or evaluation directly related to his defense of insanity. True, the Federal Medical
> (Footnote continued on next page)

Both the result and the rationale of the Schultz decision were subsequently endorsed by other courts. See, e.g., United States v. Theriault, 440 F. 2d 713 (5 Cir. 1971), cert den. 411 U.S. 984 (1973) (trial judge could not properly deny appointment of an expert under

(Footnote 18 continued)

> Center physicians examined him to determine his competency to stand trial, but a substantial difference may exist between the mental state which permits an accused to be tried and that which permits him to be held responsible for a crime. United States v. Driscoll, 399 F. 2d 135 (2d Cir. 1968). Examination for the purpose of competency to stand trial may require less exactness than those examinations designed to determine sanity for the purpose of criminal responsibility. Id. at 912 (citations omitted).

18 U.S.C. §3006A(e) on the basis that an earlier appointment had been made under 18 U.S.C. §4244 [19] on the issue of defendant's competency to stand trial). In his opinion concurring in the result, Judge Wisdom stated:

> I would read the statute . . . as requiring authorization for defense services when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses. The trial judge should tend to rely on the judgment of the attorney who has the primary duty of providing an adequate defense. 440 F. 2d supra at 717.

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19 18 U.S.C. §4244 authorizes a court, under certain circumstances, to compel a defendant to submit to psychiatric examination for the purpose of determining competency to stand trial; the results of such examination are reported to the court.

See also, United States v. Chavis, 476 F. 2d 1137 (D.C. Cir. 1973)(18 U.S.C. §3006A(e) "comprehends within its definition of 'expert witness' the assistance of a psychiatric expert in preparing and presenting an insanity defense," id. at 1141, and such expert "is intended to serve the interests of the defendant," id. at 1142);[20] and United States v. Bass, 477 F. 2d 723, 725

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20 Cf. United States v. Caldwell, 543 F. 2d 1333 (D.C. Cir. 1975), cert. den 423 U.S. 1087 (1976), finding no error in a trial judge's denial of defendant's pre-trial motion for examination by a particular psychiatrist, which examination would have been in addition to those given earlier by court-appointed experts to assess defendant's competency to stand trial. At the time of the motion, the only issue before the trial court was defendant's competency, leading the appellate court to conclude: "When the trial court is satisfied that it can resolve the issue of competence without additional appointments, we cannot construe the failure to do so as a denial of expert assistance for a substantive defense of insanity." Id. at 1350. However, the court underscored "the distinction between appointment of

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(9 Cir. 1975) (an independent expert should be appointed, pursuant to the statute, "when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having independent financial means to pay for them.")

(Footnote 20 continued)

psychiatrists to aid the presentation of an insanity defense and such an appointment to assist the court in determining competence to stand trial." Id.

For an application of United States v. Schultz in another context, see United States v. Durant, 545 F. 2d 823 (2 Cir. 1976), finding reversible error in the trial judge's refusal -- in a case where fingerprint evidence was "pivotal" -- to appoint an independent expert in that field on behalf of an indigent defendant. The Court stated:

> [T]he purpose of the [Criminal Justice] Act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant . . . . [T]he Act must not be emasculated by niggardly or inappropriate construction. Id. at 827

As noted above, although decided in the context of claims under 18 U.S.C. §3006A(e), cases such as these articulate fundamental equitable principles which should serve to guide this Court in its disposition of defendant's constitutional claims in the instant case. The "opportunity to present a meaningful defense based on lack of criminal responsibility," Schultz, 431 F. 2d, supra at 912, was clearly lacking here. The request for an independent expert was, under the circumstances, eminently reasonable and appropriate. See, Theriault, 440 F. 2d supra at 717 (Wisdom, J., concurring), and Bass, 477 F. 2d, supra at 725. In short, the equitable considerations which have led courts to a liberal construction of 18 U.S.C. §3006A(e) -- particularly in insanity defense cases -- should lead to a similarly favorable construction of

the constitutional claims of a criminal defendant, under sentence of death, who had no such statutory protection available to him under the law of the State in which he was tried.[21]

Furthermore, the distinction between examinations by court-appointed experts to determine competency to stand trial, and examinations by independent experts appointed by the court at the government's expense to aid in a defendant's presentation of the insanity defense, as clearly outlined in cases such as Schultz and Caldwell, both supra, is pertinent here. Further articulation of the distinction

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21 See also, Matlock v. Rose, -- F. 2d -- (6 Cir., April 9, 1984), which notes that "[t]he case law is still developing on the scope of the constitutional duty to supply experts," slip op. at 13, but states unequivocally: "The need for psychiatric experts in a case in which insanity is the only defense is obvious [citing United States v. Taylor, 437 F. 2d 371 (4 Cir. 1971)]," id. at 13, n. 3

can be found in United States v. Alvarez, 519 F. 2d 1036 (3 Cir. 1975), in which the court took great pains to delineate the difference between the two types of examination with particular regard to the self-incrimination implications for defendants subject to such procedures.[22]

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22 Cf., Estelle v. Smith, 451 U.S supra, finding violations of both Fifth and Sixth Amendment privileges in the State's use -- at the penalty phase of a capital trial -- of the contents of defendant's disclosures made in the course of a court-ordered psychiatric examination to determine competency to stand trial; defendant had introduced no psychiatric evidence on his own behalf at trial. The Fifth Amendment violation inhered in the State's effort to meet its burden of proof of defendant's future dangerousness by using defendant's statements "unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." Id. at 466. The Sixth Amendment violation was found to exist in the denial to defendant of counsel's assistance in "making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id at 471. In reaching these conclusions, the Court noted, without elaboration, that "a different situation arises where

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The court found no violation of the privilege against self-incrimination in the government's use at trial of the report and testimony of the psychiatrist appointed pursuant to defendant's application under 18 U.S.C. §3006A(e), since -- unlike examinations ordered under 18 U.S.C. §4244 -- defendant's disclosures to the §3006A(e) expert were "entirely voluntary." Id. at 1045. However, the court did find an inherent Sixth Amendment violation in such a situation, insofar as an expert retained to assist a defendant may be forced to be an involuntary government witness. The court concluded: "The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective

(Footnote 22 continued)
a defendant intends to introduce psychiatric evidence at the penalty phase." Id. at 472, 465-66, n. 10.

assistance of counsel in such cases." Id. at 1046. This conclusion was premised, in turn, upon the court's earlier pronouncement that "[t]he effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting ." Id. (emphasis added). Accord, Noggle v. Marshall, 706 F. 2d 1408, 1413 (6 Cir. 1983), cert. den. -- U.S. --, 104 S. Ct. 530 (1983).[23]

Finally, it is submitted that the very nature of psychiatric expertise itself necessitates subjecting such evidence to rigorous "adversarial testing" before the factfinder. Strickland v. Washington,

[23] See also, State v. Kociolek, 23 N.J. 400, 129 A. 2d 417 (1957); State v. Hamilton, 441 So. 2d, supra.

52 U.S.L.W., supra at 4570. See, in this regard, Barefoot v. Estelle, -- U.S. --, 103 S. Ct. 3383 (1983), in which this Court endorsed the validity of psychiatric expert testimony on questions of future dangerousness of defendants in capital cases, specifically relying on "the rules of evidence" and "the adversary system," 103 S. Ct. supra at 3397, to enable the factfinder to accord such evidence its appropriate weight. [24]

Rigorous "adversarial testing," in turn, requires that the adversaries themselves be equipped to handle effectively both the direct presentation

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24 See, Addington v. Texas, 441 U.S. 418, 430 (1979), in which the Court alludes to the "subtleties and nuances of psychiatric diagnosis" which "render certainties virtually meaningless" in the context of civil commitment hearings at which the issue is "whether the individual is mentally ill and dangerous . . . and . . . in need of confined therapy.[.]"

of psychiatric evidence as well as cross-examination of any experts offered in opposition. Thus, "the guiding hand of counsel," Powell v. Alabama, 287 U.S. supra at 69, itself requires guidance from the very experts whose testimony is elicited -- or challenged -- by counsel. In other words,

> the blame for a suspect expert opinion must be borne together by the mental health professional who presents it and the legal professionals who wittingly allow its uncontested presentation. Poythress, "Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony," 2 L. & Hum. Behav. 1, 18 (1978). [25]

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25 It has been suggested, furthermore, that as a general rule:

> many lawyers possess scant knowledge about psychiatric decision-making, diagnoses, and evaluation tools. This shortcoming can seriously impede their cross-examination of expert witnesses. Once psychiatric testimony is elicited few lawyers have the special skills to evaluate such testimony.

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A defense attorney, in a criminal trial involving the insanity defense, who is realistically expected to fulfill his proper role of adducing probative evidence in support of his client's claim and in challenging the State's evidence, must acquire the requisite psychiatric expertise to accomplish that task. At least one commentator has highlighted this imperative in insanity trials:

> Insofar as the psychiatrist's decision to take one side or the other on the responsibility issue is based on pragmatic considerations or expediencies and not on the objective facts about the illness, this raises serious questions about expert testimony on the issue of sanity/

(Footnote 25 continued)

> Perlin and Sadoff, "Ethical Issues in the Representation of Individuals in the Commitment Process," 45 L. & Contemp. Prob. 161, 166 (1983).

See also, Golten, "Role of Defense
(Footnote continued on next page)

> insanity. For though it is his special skill and training which entitles him to testify as an expert witness, the psychiatrist's expert opinion on the issue of insanity may be a function of his personal values and his own pragmatic judgments, not a function of the defendant's mental illness in any objective sense. Poythress, "Mental Health Expert Testimony: Current Problems," 5 J. Psychiatry & L. 201, 204 (1977)

Thus, defense counsel in insanity trials must be prepared both to thrust and to parry with psychiatric expert testimony. "Cross-examination may suggest the fallibility of the opposing psychiatrist and the shortcomings of the psychiatric profession. But calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense." Ennis and Litwack,

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(Footnote 25 continued)

Counsel in the Criminal Commitment Process," 10 Am. Crim. L. Rev. 385 (1972).

"Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693, 746 (1974).[26]

Advocacy, alone, does not suffice. Effective advocacy requires obtaining

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[26] Without some knowledge of how to effectively cross-examine psychiatric expert testimony or some appreciation of the testimony of an independent mental health examiner [an] attorney . . .could offer only a token defense for his client. Poythress, 5 J.Psychiatry & L., supra at 214.

See, generally, Ziskin, Coping With Psychiatric and Psychological Testimony (3d ed. 1981), for an in-depth survey and analysis of deficiencies -- and resultant lack of reliability -- inherent in a vast array of psychological and psychiatric methodologies. In the author's own words:

> It is the aim of this book to demonstrate that despite the ever-increasing utilization of psychiatric and psychological evidence in the legal process such evidence frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law,

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meaningful assistance in asserting a vigorous defense. Without access to independent psychiatric expertise in aid of such a defense in insanity trials, the constitutionally mandated level of adequate representation by counsel cannot be met.

(Footnote 26 continued)

> and if admitted, should be given little or no weight. Id. at vii, quoting "[t]he first sentence of the first issue of this book published in 1970," id.

II.

THE INVOLUNTARY MEDICATION OF PETITIONER WITH THORAZINE, AFFECTING HIS DEMEANOR AND ABILITY TO COMMUNICATE DURING TRIAL, VIOLATED DUE PROCESS AND EQUAL PROTECTION RIGHTS

A. The Known Properties Of Thorazine And Its Probable Effects On Petitioner

It is a matter of record in this case that petitioner was regularly medicated against his will with 600 mg. of Thorazine daily during his trial. See, Transcript of Trial, June 23-26, 1980, at 469, 560-561, 574-75, 585 and 591. The question before the Court is the extent to which defendant was affected by this forced "drugging," and the degree to which his reaction to the Thorazine affected both the course and the outcome of his trial.

The position of amicus curiae is that a hearing was required on petitioner's mental status during the trial because

of the well-known properties of Thorazine,[27] its predictable side effects[28] and its as yet unknown, but very likely, causal relationship to what the Oklahoma Court of Criminal Appeals referred to as the "'abnormal' behavior" of petitioner throughout his capital trial.[29]

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[27] See, e.g., Kinross-Wright, "The Current Status of Phenothiazines," 200 J.A.M.A. 461 (1967); see also Physicians' Desk Reference 1896 (1984 ed.)

[28] See, e.g., Ayd, "A Survey of Drug Induced Extrapyramidal Reactions," 175 J.A.M.A. 1054 (1961); see also Hollister, "Adverse Reactions to Phenothiazines," 189 J.A.M.A. 311 (1964).

[29] In its opinion, the Oklahoma Court acknowledged the drugging and described Ake's behavior at trial in these specific terms:

> The appellant remained mute throughout his trial. He refused to converse with his attorneys and stared straight ahead during both stages of the proceedings.
> Ake v. Oklahoma, 663 P. 2d supra, at 6

The Court speculated that "(i)t is quite possible that the defense of insanity

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Far from being a new development in psychopharmacology, Thorazine -- chemically named chlorpromazine -- was the first of the major psychotropic drugs to be developed and has been widely used to treat mental illness since its development in the early 1950's.[30] In a very short time, Thorazine became widely used and its properties quickly came to the attention of many courts, both state[31] and federal,[32] including,

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(Footnote 29 continued)
interposed by appellant fostered such behavior on his part." Id., at 7, n. 4.

30 Winick, "Psychotropic Drugs and Competence to Stand Trial," 1979 Am. Bar Fndtn Res. Journal 769, 780.

31 See, e.g., People v. Ackles, 304 P. 2d 1032 (C.A. 3rd Dis. Calif. 1956).

32 See, e.g., G.D. Searle & Co. v. Institutional Drug Distributors, 141 F. Supp. 838 (D.C. Cal. 1955).

eventually, this Court.[33] It is undisputed that, inter alia, Thorazine is a powerful sedative.[34] The caselaw description of this drug's properties have covered a range from "mild tranquilizer"[34] to a "powerful,"[36] "potentially dangerous,"[37] and, most

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33 Vitek v. Jones, 445 U.S. 480 (1980), Transcript of Oral Argument, April 24, 1978, p. 29; Mills v. Rogers, 457 U.S. 291,293, n. 1 (1982); Jones v. U.S., -- U.S. --, 103 S. Ct. 3043, 3058, n. 16 and 3060-61

34 Phenothiazines can also be classified in terms of the drowsiness that they produce in the first week or two of administration. Given in therapeutic doses, drugs such as chlorpromazine and thioridazine tend to produce the most drowsiness (and are for this reason sometimes called sedative phenothiazines). Detre and Jarecki, Modern Psychiatric Treatment 536 (Lippincott, 1971) (emphasis in original)

35 Ellis v. U.S., 484 F. Supp, 4,6 (D.S.C. 1975)

36 Chesney v. Adams, 377 F. Supp. 887, 839 (D. Conn. 1974)

37 Ruiz v. Estelle, 503 F. Supp. 1265, 1326 (S.D. Tex. 1980), 650 F. 2d 555 (5 Cir. 1982), 666 F. 2d 854 (5 Cir. 1982), 679 F. 2d 1115 (5 Cir. 1982), (Footnote continued on next page)

recently "unavoidably unsafe",[38] "major tranquilizer."[39]

An additional factor which this Court must consider -- and which should have been considered by the courts below-- is that, in addition to its well known, predictable and intended effects (and its equally well known if still unintended side effects), Thorazine can

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(Footnote 37 continued)
688 F. 2d 266 (5 Cir. 1982), cert den. -- U.S. --, 103 S.C. 1438 (1983).

38 Stone v. Smith, Kline & French, No. 82-7232, slip op.(11th Cir., May 14, 1984). In that recent case, the manufacturer of Thorazine successfully defended a tort claim arising out of a patient's exposure to the drug by arguing that Thorazine was an "unavoidably unsafe" product within the terms of Comment k to Section 402A of the Restatement (Second) of Torts.

39 U.S. v. Wilson, 471 F. 2d 1072, 1074 (D.C. Cir. 1972), cert. den. 410 U.S. 957 (1973).

39 See, n. 28 supra.

also cause still other effects which vary widely by dosgage and from individual to individual, its so-called "idiosyncratic" responses.[40] It is also now well-documented that the effects of Thorazine, like those of other psychotropic drugs, can even be further affected by the milieu or context in which it is given, including whether or not the drugs are taken voluntarily or -- as in this case -- involuntarily.[41] Thus, virtually every case

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40 See, e.g., Deniker, "Impact of Neuroleptic Chemotherapies on Schizophrenic Psychoses," 135 Am. J. Psych. 923 (1978); see also Kolb and Brodie, Modern Clinical Psychiatry 395 (10th ed. 1982).

41 See, e.g., Rennie v. Klein, 462 F. Supp. 1131, 1141 (D.N.J. 1979) ("E. The Efficacy of Forced Medication);" see also, Cameron and Wimer, "An Anticholinergic Toxicity Reaction to Chlorpromazine Activated by Psychological Stress," 167 J. of Nerv. and Ment. Dis. 508 (1979); Hartley, Couper-Smartt and Henry, "Behavioral Antagonism Between Chlorpromazine and Noise in Man," 55 Psychopharmacology 97 (1977). See also, as to the very high degrees of stress
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involving the "right to refuse" medication has specifically included Thorazine in the list of drugs subject to its procedures.[42]

As noted above, it is in the very nature of Thorazine to produce drowsiness,

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(Footnote 41 continued)

associated with being charged with, convicted of and/or sentenced for a crime, Goldberg and Breznitz,eds., Handbook of Stress: Theoretical and Clinical Aspects at 340-45 (Free Press, 1983).

[42] See, e.g., Rennie v. Klein, 476 F. Supp. 1294, 1306 (D.N.J. 1979); Anderson v. State of Arizona, 663 P. 2d 570, 572 (Ariz. Ct. App. 1983); Davis v. Hubbard, 506 F. Supp. 915, 927 (N.D. Ohio 1980); Jamison v. Farabee, No. C-78-0445-WHO N.D. Calif., (Consent Order filed April 26, 1983), reported at 7 Ment. Dis. L. Reptr. 436 (1983); Project Release v. Prevost, 722 F. 2d 960, 977 n. 17 (2nd Cir. 1983); Rogers v. Okin, 478 F. Supp. 1342, 1360 (D. Mass. 1979); and Rogers v. Comm. of Mental Health, 390 Mass. 489, 458 N.E. 2d 308, 310 n. 3 (S.J.Ct. 1983).

In addition, the Oklahoma "right to refuse" case, In re K.K.B., 609 P. 2d 747 (Okla. Sp. Ct. 1980), clearly includes Thorazine within its term "major tranquilizers" although no specific drugs are named. 609 P. at 748.

apathy and even resistance to speaking. Despite the state court's dismissal of petitioner's "abnormal" behavior as possibly "fostered by his insanity defense,[43] his demeanor and attitude could actually have just as likely been either the result of the forced administration of Thorazine or the product of

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[43] Allegations of "faking" have been a standard institutional response to patients' complaints about the severe side effects of psychotropic medications. See, e.g., Rennie v. Klein, 462 F. Supp. supra at 1140. This is hardly a new problem. In 1838, Dr. Issac Ray, the father of American forensic psychiatry, noted that:

> [T]he supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more human doctrines.

Ray, A Treatise on the Medical Jurisprudence of Insanity, supra, §247, at 243.

his mental illness.[44] Only a hearing on petitioner's mental status while under medication at the trial could even begin to answer the question of what factors were actually responsible for his admittedly "abnormal" behavior at trial.

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[44] Schizophrenic patients with post-psychotic depression have been described as "wooden" in appearance, motorially "inactive or retarded," lacking initiative to perform routine tasks, experiencing overwhelming fatigue and neurasthenic symptoms, "hypersomnic" and "emotionally withdrawn." Nearly all reports comment on the patient's disinclination to speak. All of these symptoms, however, can be manifestations of antipsychotic drug-induced akinesia. Van Putten and May, "'Akinetic Depression' in Schizophrenia," 35 Arch. Gen. Psych. 1101 (1978). See also, Hartley and Couper-Smartt, "Paradoxical Effects in Sleep and Performance of Two Doses of Chlorpromazine," 58(2) Psychopharmacology 201 (1978); Scott v. Plante, 532 F. 2d 939, 945, n. 8 (3 Cir. 1976), 641 F. 2d 117 (3 Cir. 1981), vac. and rem. 458 U.S. 1101, 102 S. Ct. 3474 (1982), on remand 691 F. 2d 634 (3 Cir. 1982).

B. The Relevant Caselaw And Other Authorities Support Petitioner's Arguments Against His Drugging

In a number of well-reasoned cases and articles, courts and other authorities have considered the impropriety of administering medication to defendants in a manner which primarily affects their demeanor and ability to communicate at trial.[45]

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[45] Initially, courts have considered the drugging of defendants, particularly with narcotics, in the context of effects on intellectual and cognitive functioning rather than the issues of demeanor and communication involved here. See, e.g., Sanders v. U.S., 373 U.S. 1 (1963); Hansford v. U.S., 365 F. 2d 920, 922-23 (D.C. Cir. 1966). Thus, for example, in Whitehead v. Wainwright, 447 F. Supp. 898 (M.D. Fla. 1978), aff'd on this issue, vac. and rem. on other grounds, 609 F. 2d 223 (5 Cir. 1980), the issue was the effects of tranquilizers and other drugs on the defendant's cognitive ability.

Two of the leading cases -- State v. Murphy, 56 Wash. 2d 761, 355 P. 2d 323 (1960) and State v. Maryott, 6 Wash. App. 96, 492 P. 2d 239 (1971) have already been extensively discussed by the parties and the court below.[46] The most recent important case considering the issue of the effects of drugging on demeanor is Commonwealth v. Louraine, 390 Mass. 28, 453 N.E. 2d 437 (S. J. Ct. 1983) decided in August, 1983 by the Supreme Judicial Court of Massachusetts, the same court which in November, 1983 decided Rogers v. Commissioner of Mental Health, 390 Mass. 489, 458 N.E. 2d 308 (S.J. Ct. 1983), on the certification of questions from the

46 See also, In re Pray, 133 Vt. 253, 336 A. 2d 174 (1975) (jury should have been informed that defendant was heavily medicated, thereby affecting his behavior at trial).

First Circuit after the remand from this Court in Mills v. Rogers, supra. In Louraine, the Court summarized its views on the state of the law on the issue now before this Court, see 453 N.E. 2d supra at 442-3, and concluded, relying on Murphy, Maryott and In re Pray, all supra, that defendant had the right to be tried in an unmedicated condition; on this basis the conviction below was reversed.

Thus, it is clear from the earlier decisions in Murphy, Maryott, Pray and now Louraine, that such courts are considering and criticizing the administration of psychotropic medication which affects demeanor and communication as a concern distinct from the issues of drugging of defendants vel non and competency at trial.[47]

47 Compare Scrignar, "Tranquilizers and the Psychotic Defendant," 53 A.B.A.J. 43 (1967); Bushman and Reed, "Tranquilizers

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Similarly, other well-respected commentators on the general subject of drugging defendants have repeatedly addressed the demeanor issue in terms consistent with the holdings in Murphy, Maryott and Louraine and with petitioner's position here.[48] In particular, the typical side-effects of Thorazine and other psychotropic drugs have been specifically noted as factors requiring regular psychiatric and judicial monitoring of a medicated defendant's mental

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(Footnote 47 continued)

and Competency to Stand Trial," 54 A.B.A.J. 284 (1968).

48 See, e.g., Winick, supra at 782: "The fact that the defendant's competence is drug induced should not disqualify him from trial unless the drug causes side effects that materially impair his ability to understand and participate in the proceedings." (emphasis added). See also, Group for the Advancement of Psychiatry: Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial, 903-4 (February, 1974).

status during trial.[49] It is worth noting that even earlier comments on the use of these drugs in trial specifically highlighted the problems that the drugs could cause by substantially altering the demeanor of the defendant.[50]

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> Specific psychiatric-legal inquiries on the patient-defendant's mental competency to stand trial should be conducted regularly during the entire period of the patient's drug treatment . . . .

Haddox and Pollack, "Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)," 17 J. For. Sci. 568, 575 (1972). See also, Haddox Gross and Pollack, "Mental Competency to Stand Trial While Under the Influence of Drugs," 7 Loyola L.A.L.R. 424, 446-7 (1974).

50 Use of drugs, could, of course, interfere with a defendant's competency to stand trial, if, for example, the drug's effect were to give him an odd appearance that might lead a jury to misinterpret his courtroom demeanor: an unperturbed "wooden face" might give a jury the impression that the defendant is

(Footnote continued on next page)

To some extent this newly emerging issue of altered demeanor and restricted communication ability at trial under forced medication [51] can be analogized to the historical practices of binding, gagging or shackling defendants [52] or even to the display before the court of defendants in prison clothes. [53] To be sure, there are obvious similarities, in terms of jury prejudice and inter-

(Footnote continued)
a calculating merciless criminal . . . .
Burt and Morris, "A Proposal For Abolition of the Incompetency Plea," 40 U. Chi. L. Rev. 66, 85-6 (1972).

51 The issue of drug-altered demeanor had also surfaced earlier in the context of state commitment hearings. See, e.g., Suzuki v. Quisenberry, 411 F. Supp. 1114 (D. Haw. 1976). See also, "Developments in the Law: Civil Commitment of the Mentally Ill," 87 Harv. L.R. 1190, 1282-3, n. 11 (1974).

52 See, e.g., Illinois v. Allen, 397 U.S. 337 (1970). The analogy between drugs and chains is not original to any one source. See, e.g., State v. Maryott, supra at 241; see also Ferleger, "Loosing the Chains: In-Hospital Civil Liberties of Mental Patients," 13 Santa Clara Law. 447 (1973).

53 See, e.g., Estelle v. Williams, 425 U.S. 501 (1976).

ference with right to counsel, between the "zombie" or "mask face" drugged defendant and the bound, gagged and shackled accused. Yet, even the most extensive physical restraints can be removed in a few moments to permit free movement and communication, whereas drugging with Thorazine has long-lasting effects on both demeanor and attitude. [54] A fortiori then, apart from a jury's continued memory of any physical restraints once they are removed, the die is cast once a defendant has been drugged for any appreciable period before or during trial as petitioner was in this case.

In the shackling situation, this

54 See, e.g., Winsberg and Yepes, "Antipsychotics (Major Tranquilizers, Neuroleptics)" in Werry ed. Pediatric Psychopharmacology: The Use of Behavior Modifying Drugs in Children, at 237-38 1978). See also, as to shackles and other physical restraints compared to psychotropic medication, Rennie v. Klein, 720 F. 2d supra at 274 (concurring opinion of Weis, J.)

Court has required the application of a careful set of increasingly restrictive measures before permitting the final step of binding, gagging and shackling.[55] Here, there was no determination at trial of what caused petitioner's behavior or whether, in effect, he was actually being chemically bound, gagged and shackled or being forceably maintained in a demeanor over which he could exercise no control.[56] Again, as with the

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See Illinois v. Allen, supra.

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In Ake v. Oklahoma, 663 P. 2d supra at 7, the Court sought to distinguish Peters v. State, 516 P. 2d 1373 (Okla. Cr. 1973) on the basis that Ake's medicated condition was not for the sole purpose of facilitating his trial. Given that the result was the same in the eyes of the jury, whatever the alleged purpose of the medication, this seems to be a distinction without a difference.

issue of the effects of Thorazine generally, it is submitted that an appropriate solution would be to require a hearing on the demeanor-altering and communication-restricting effects of defendant's drugging at time of trial.[57]

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The need for such an inquiry in turn underscores the imperative of affording defendants in this situation access to independent psychiatric expertise in furtherance of a proffered insanity defense. See, pp. 40-46.

CONCLUSION

Based on the foregoing, amicus respectfully submits that the conviction and sentence of death should be reversed and the matter remanded for re-trial in a manner consistent with the principles articulated herein.

Respectfully submitted,

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